BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL A. COATES Claimant	)	
VS.	)	Docket No. 1,057,719
STATE OF KANSAS Respondent	)	
AND	)	
STATE SELF-INSURANCE FUND Insurance Fund	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance fund appealed the January 17, 2012, Preliminary Hearing Order (Order) entered by Administrative Law Judge (ALJ) Rebecca Sanders. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Karl L. Wenger of Kansas City, Kansas, appeared for respondent and its insurance fund (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 17, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

On August 21, 2011, claimant was carrying two trash bags while descending a flight of three steps at work. Claimant was in a hurry as he was responsible for two juveniles who were cleaning floors and wanted to keep them in his sight. As claimant stepped on the second step, he rolled his ankle. The ALJ determined that claimant met with personal injury by accident arising out of and in the course of his employment with respondent. ALJ Sanders designated the first available physician at Kansas Orthopedics and Sports Medicine as claimant's authorized treating physician.

Respondent appeals and argues claimant's personal injury by accident did not arise out of and in the course of his employment as claimant's injury was the result of a "neutral risk." Under the Kansas Workers Compensation Act that was in effect prior to May 15, 2011 (Old Law), if claimant's injury was the result of a neutral risk, it would be compensable. However, K.S.A. 2010 Supp. 44-508 was amended by the Kansas Legislature, and after May 15, 2011, the Kansas Workers Compensation Act (New Law) specifically provides that the term "arising out of and in the course of employment" does not include injuries resulting from normal day-to-day activities, from a neutral risk or a risk personal to the worker.[1] Respondent argues that claimant had an unexplained fall and, therefore, was injured as the result of a neutral risk. At the preliminary hearing, respondent also alleged claimant's fall was the result of the activities of day-to-day living.

Respondent also asserts the ALJ exceeded her jurisdiction by ordering medical treatment for claimant. Claimant requests that the Order of the ALJ be affirmed in its entirety. Therefore, the issues are:

1. Did claimant sustain a right ankle injury by accident on August 21, 2011, arising out of and in the course of his employment with respondent?

2. Did the ALJ exceed her jurisdiction and/or authority by ordering medical treatment for claimant? Specifically, does the Board have jurisdiction to review this issue?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant works for Kansas Juvenile Corrections. At 8:00 p.m. on August 21, 2011, claimant was supervising two juveniles. Claimant is to keep the juveniles in his sight at all times. If he cannot, he is to "lock down" the juveniles. The two juveniles, who were serious offenders, had gathered trash from a day hall (also referred to as a unit by claimant) at the facility. Claimant testified, "I was gathering trash out of the office area which is a controlled room in between two units, so I have to go in there to get the trash and bring it back out so that it's ready to be taken out."[2] After the juveniles and claimant placed the trash into bags, claimant would take the bags down some stairs, out a door and into a sally port. While claimant is out the door and in the sally port, the juveniles are out of his vision for a brief period of time.

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[1] K.S.A. 2011 Supp. 44-508(f)(3)(A).

[2] P.H. Trans. at 6.

Claimant testified that he is usually in a hurry when he takes the bags of trash to the sally port. He wants to limit the time the juveniles are out of his sight. In fact, when claimant uses the restroom, he "locks down" the juveniles. Claimant indicated that when he takes the trash out at home, he takes it out in a different manner than he does at work. When he takes the trash out at home, claimant takes his trash out the back of his home, down one step. However, at home claimant is not in as big of a hurry to take the trash out as he is at work.

At the time he descended the stairs, claimant was carrying two trash bags, a 55-gallon trash bag and a kitchen-type trash bag, in front of him. He carried two bags in order to return to the unit more quickly. The two juveniles remained in the day hall and were sweeping and mopping the floor. When descending the stairs, as he was stepping onto the second step, claimant rolled his right ankle. Claimant fell and landed on his shoulder and body. He testified the steps were clean and not wet. He immediately felt intense pain, rolled over and called for help. Claimant was assisted by several other employees, including his supervisor, Sergeant Thompson. Claimant was sent by respondent to the emergency room at St. Francis Health Center (St. Francis). The medical report from that visit was not made part of the record.

Claimant returned to St. Francis on August 26, 2011. The impression of the attending physician, Dr. Donald T. Mead, was that claimant had a right ankle sprain and claimant could return to his normal duties. Dr. Mead gave claimant no restrictions. Dr. Mead's report indicates that since the accident, claimant started using the treadmill and had gone golfing. Claimant testified that Dr. Mead said it would be good to walk on a treadmill. He also testified that he did not actually play golf, but only practiced his putting and chipping.

At the request of his attorney, claimant was seen on September 19, 2011, by Dr. Daniel D. Zimmerman, who specializes in internal medicine. He examined claimant and had claimant's right foot and ankle x-rayed. The AP view of the right ankle demonstrated what Dr. Zimmerman thought might be a hairline fracture in the distal fibula. He opined that claimant had not yet reached maximum medical improvement. Dr. Zimmerman stated in his report:

> Mr. Coates may require an MRI of the right foot and ankle. He would benefit with physical therapy management and/or orthopedic management depending on the results of the MRI of the right foot and ankle. If he has a subtle fibular fracture, he may require casting and/or other orthopedic interventions.
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> If there is no fracture of the distal fibula, physical therapy management and perhaps injections with steroid and local anesthetics may be warranted.[3]

[3] *Id.*, Cl. Ex. 1 at 4.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) provides:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant parts:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-534a provides:

(a)(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

ANALYSIS

This Board Member finds that claimant sustained a right ankle injury by accident that arose out of and in the course of his employment with respondent. Claimant's job duties included cleaning an office, supervising juveniles while they clean the unit and taking bags of trash from the unit, out a door and into a sally port. While performing these job duties, claimant is required to keep the juveniles within his vision at all times.

Respondent argues that the task of taking the bags of trash out is a normal day-to-day activity and, therefore, does not meet the definition of arising out of and in the course of employment. Respondent asserts that at his home, claimant takes the trash out in the same manner as he does at work. The specific activity in which the claimant was engaged at the time of his injury was walking down the stairs, which is an activity that is not limited to the work claimant performed for respondent. Undoubtedly, claimant had to descend steps and take out trash when he was not working and in that sense the claimant's injury and disability were consequences of an activity of day-to-day living. The Kansas Supreme Court in *Bryant*[6] instructs that the analysis should not end with that determination. The court found that the focus of the inquiry is not on an isolated movement but rather on the overall context of what claimant was doing and whether that activity is connected to or inherent in the performance of his job.

In the present claim, respondent ignores two important facts. First, one of claimant's required job duties is to take out the bags of trash. Second, when claimant takes the trash out at work, he hurries to take the trash out so as not to lose visual contact with the juveniles he is charged with supervising. At home, claimant is not supervising juveniles and can take the trash out at whatever pace he desires.

Respondent argues that when he fell at work, claimant was engaged in a neutral risk activity and compares the facts of the present claim to those in *McCready*.[7] On her way back from an appointment with a doctor because of a previous work-related accident,

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[4] K.S.A. 2011 Supp. 44-534a.

[5] K.S.A. 2011 Supp. 44-555c(k).

[6] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 595-96, 257 P.3d 255 (2011).

[7] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

McCready was injured when she fell on a handicapped walkway leading to the front door of Payless. The Kansas Court of Appeals determined claimant's fall was unexplained and, therefore, constituted a neutral risk. Here, there is an explanation for claimant's fall. While claimant was engaged in a required work activity he took a misstep and rolled his ankle. McCready, on the other hand, was merely walking back to Payless and was not engaged in a work activity.

This Board Member finds claimant was engaged not in a neutral risk activity, but an activity associated with his job. Claimant was carrying trash bags and moving at a faster pace than he did when taking out trash at his home. Claimant carried two trash bags at once to get back to the unit quickly. As the Court stated in *Bryant*:

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the *[sic]* whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement[–]bending, twisting, lifting, walking, or other body motions[–]but looks to the overall context of what the worker was doing[–]welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[8]

Respondent asserts the ALJ exceeded her authority and/or jurisdiction in authorizing medical treatment for claimant. In its brief respondent asserts, "The Board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the Workers' Compensation Act."[9] This statement disregards the jurisdictional limits imposed upon the Board by the Kansas Legislature in K.S.A. 44-534a and amendments thereto and K.S.A. 2011 Supp. 44-551.

The ALJ has the authority pursuant to K.S.A. 44-534a and amendments thereto to make a preliminary award of medical compensation and temporary total disability benefits. Therefore, respondent's argument that the ALJ exceeded her authority and/or jurisdiction in authorizing medical treatment for claimant is without merit. This Board Member finds the ALJ neither abused her discretion nor acted outside the scope of her jurisdiction. Neither K.S.A. 44-534a and amendments thereto nor K.S.A. 2011 Supp. 44-551 confers jurisdiction upon the Board to review whether an ALJ's preliminary award of medical benefits is reasonable or necessary. Accordingly, respondent's application for Board review on this issue is dismissed.

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[8] *Bryant*, 292 Kan. at 596.

[9] Respondent's Brief at 1 (filed Feb. 20, 2012).

CONCLUSION

1. Claimant proved by a preponderance of the evidence that he sustained a right ankle injury by accident on August 21, 2011, arising out of and in the course of his employment with respondent.

2. The ALJ did not exceed her jurisdiction and/or authority by ordering medical treatment for claimant. The Board does not have jurisdiction to review this issue and, therefore, dismisses respondent's application for review on this issue.

WHEREFORE, the undersigned Board Member affirms the January 17, 2012, Preliminary Hearing Order entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Roger D. Fincher , Attorney for Claimant
Karl L. Wenger, Attorney for Respondent and its Insurance Fund
Rebecca Sanders, Administrative Law Judge